Supreme Court, U.S.
FILED

159

No. 09-1281 APR 21 2010

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In The

Supreme Court of the United States

MARK E. BAUDER,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

On Petition For Writ Of Certiorari To The Kentucky Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does turning a vehicle within sight of a police road block justify a traffic stop and investigative detention of the driver?

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The opinion of the Kentucky Supreme Court appears at 299 S.W.3d 588 (Ky. 2009).

JURISDICTION

The opinion of the Kentucky Supreme Court was rendered October 29, 2009. Its order denying petitioner's petition for rehearing was entered January 21, 2010. This Court has jurisdiction under 28 U.S.C. § 1257(a) to review the decision of the Kentucky Supreme Court on writ of certiorari.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution – Amendment 4

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Constitution – Amendment 14

¶ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law

which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF CASE

This DUI case was decided by the Boyle County, Kentucky, District Court on the motion of petitioner, Mark E. Bauder, "to suppress all evidence gathered during his unlawful, warrantless arrest, in the absence of probable cause, at an improperly established road block." The Fourth Amendment was referenced specifically in petitioner's suppression memorandum to the trial (District) court, his statement of appeal to the Boyle Circuit Court, his motion for discretionary review to the Kentucky Court of Appeals, and in his briefs and petition for rehearing to the Kentucky Supreme Court. In its adverse ruling the trial court did not issue a written order containing findings, instead adopting "the reasons set forth in the **Commonwealth's Response to Memorandum of Defendant** and incorporated [t]herein by reference." (App. 22). Petitioner entered a conditional plea of guilty, reserving his right of appeal. The Boyle County, Kentucky, Circuit Court, sitting on appeal, affirmed the district court by order entered August 27, 2007. It made no mention of state or federal constitutional provisions. The cases cited by it for support, however, apply the Fourth and Fourteenth

Amendments. (App. 16-19). The Kentucky Court of Appeals denied discretionary review by order entered December 17, 2007. (App. 15). The Kentucky Supreme Court granted discretionary review by order entered May 14, 2008. It affirmed the decisions of the lower courts by opinion rendered October 29, 2009, after acknowledging the Fourth Amendment controlled. *Bauder v. Comm.*, 299 S.W.3d 588, 590 (2009) (App. 3). That decision became final upon denial of rehearing by order entered January 21, 2010. (App. 24).

Mark Bauder was arrested December 26, 2005, at about 11:00 p.m. by Kentucky State Trooper Eric Gibson and charged with driving under the influence of alcohol, contrary to KRS 189A.010. Gibson and another trooper had just established a road block at the intersection of Kentucky Highway 300 and Kentucky Highway 34 in Parksville, Kentucky. This intersection was the center of the rural community. (Map, App. 25). There were no warning signs or other notice to the public in advance of this road block. There were no markings or signs at the scene to warn of the road block. The trooper justified the stop because he said Bauder had tried to avoid his road block. On the citation he said Appellant was "driving through the parking lot of the fire station." The evidence, however, showed Bauder turned left onto Mill Road to reach Kentucky 300, instead of coming through the police vehicles with their emergency lights operating at the intersection of routes 34 and 300. He committed no offense observable by Trooper Gibson.

The intersection of Mill Street and Kentucky 34 was some 80 to 100 yards from the road block, as was the intersection of Mill Street and Kentucky 300, where Bauder turned left to return to his home just up the road. When stopped he told the trooper he had seen the emergency lights and thought there might have been a wreck. A neighbor, Troy Belcher, who had lived at the same house in Parksville for some eight years, testified about using Mill Street to avoid the Ky. 34/300 intersection. He said he would also have used Mill Street to avoid what looked like a probable wreck.

So far as the trooper was concerned, the only reason to avoid a "checkpoint" was criminal activity. He acknowledged that he stops all vehicles he believes are avoiding a checkpoint, unless manpower is not available. When asked about his experience in similar circumstances Trooper Gibson reported candidly and frankly that not all drivers he stopped for avoiding a road block were committing any offense at all.

REASON FOR GRANTING THE PETITION

THIS COURT SHOULD RESOLVE THE SPLIT AMONG STATE COURTS OF LAST RESORT WHETHER TURNING A VEHICLE WITHIN SIGHT OF A POLICE ROAD BLOCK JUSTIFIES A TRAFFIC STOP AND INVESTIGATIVE DETENTION OF THE DRIVER.

State courts of last resort answer the question differently. All agree the totality of circumstances is the basis of decision. Some actually require additional facts beyond what a police officer perceives as avoidance of the road block. These include Pennsylvania, *Comm. v. Scavello*, 557 Pa. 429, 734 A.2d 386 (Pa. 1999);Virginia, *Bass v. Comm.*, 259 Va. 470, 525 S.E.2d 921 (2000); and Nebraska, *State v. McCleery*, 251 Neb. 940, 560 N.W.2d 789 (1997). The result was the same where the state conceded an illegal stop. *Pooler v. Motor Vehicles Div.*, 306 Or. 47, 755 P.2d 701 (1988) (license suspension case); *State v. Badessa*, 185 N.J. 303, 885 A.2d 430 (2005) (breathalyzer refusal case). Hawai'i reaches the same result under its own constitution, although its analysis relies heavily on decisions of this Court. *State v. Heapy*, 113 Hawai'i 283, 151 P.3d 764 (2007). Others, including the Kentucky Supreme Court in the present case, accept the officer's belief of evasion, caused by turning from the road block, as sufficient to justify the traffic stop. These include North Carolina, *State v. Foreman*, 351 N.C. 627, 527 S.E.2d 921 (2000); South Dakota, *State v. Thill*, 474 N.W.2d 86 (S.D. 1991); and New Mexico, *State v. Anaya*, 47 N.M. 100, 217 P.3d 586 (2009). Two

federal circuits have also dealt with the same or similar circumstances. The newer one approved the stop. *U.S. v. Smith*, 396 F.3d 579 (4th Cir. 2005). The older case rejected it. *U.S. v. Ogilvie*, 527 F.2d 330 (9th Cir. 1975) (Border Patrol road block).

The Fourth Amendment, through the Fourteenth Amendment, protects us from unreasonable search and seizure. This Court has determined that highway sobriety road blocks conducted *pursuant to a systematic plan* do not violate the Fourth Amendment. *Mich., Dept. of State Police v. Sitz*, 496 U.S. 444 (1990). One reason the road block in Sitz had been rejected in lower courts was concern that drivers would not be aware they could turn away from it. *Id.*, 496 U.S. at 452. The Court did not address the question in that opinion and has not since. Perhaps the time has come. Here the road block was little more than side show. Bauder was not stopped at a road block, but a hundred yards from one after taking an earlier turn to his destination.

Trooper Gibson only pursued petitioner because he thought he was avoiding the checkpoint, although he could give no specific criminal activity. As the respondent stated in its Boyle County filings below, "Tpr. Gibson noticed a vehicle traveling from the direction of Danville on KY 34 turn left as it approached the checkpoint; that suspecting the vehicle's operator was attempting to avoid the checkpoint, Tpr. Gibson, using his police cruiser, pursued the vehicle and conducted a traffic stop near the intersection of Mill Road and KY 300. . . ." This was the sum total

of Bauder's offense. The Kentucky Supreme Court agreed. *Bauder, supra*, at 590.

The Fourth Amendment protects us from seizure in our automobiles, however brief the detention or limited its purpose. *Delaware v. Prouse*, 440 U.S. 648, 653 (1979). A roadblock is not "justified only by the generalized and everpresent possibility that interrogation and inspection may reveal that any given motorist has committed some crime." *Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000). Stopping an individual vehicle carrying its family requires an individualized suspicion of wrongdoing, or it is unreasonable under the Fourth Amendment. *Id.*, 531 U.S. at 37. The decision below and others deferring to the officer's suspicions give police officers authority to stop any traffic upon the highway after forming an opinion the driver is avoiding contact with police at a road block. Many mention *Illinois v. Wardlow,* 528 U.S. 119 (2000). The synthesis of teachings from this Court yields an undesirable result. The exception swallows the Fourth Amendment.

This Court speaks of "specific and articulable facts" that, with inferences from them, support a warrantless seizure. *Terry v. Ohio*, 392 U.S. 1, 22-3 (1968). The weighing of these matters is for a court, where "due weight must be given not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Id.*,

392 U.S. at 27. A "hunch" may be defined as "an intuitive feeling or a premonition."[1] The objective question is, "would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" *Terry, supra*, 392 U.S. at 21-2. Stated differently, "Based upon that whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity." *U.S. v. Cortez*, 449 U.S. 411, 418-19 (1981).

The Fourth Amendment demands some suspicion of a particular crime, not suspicion of a litany of potential traffic offenses. To say otherwise elevates natural suspicion that we all may feel, only more so with police, to a Constitutional principal. As to a hammer is everything a nail, so to police is everyone a suspect. There remains a right in this country to be left alone, even in transit. "[T]he Fourth Amendment rests on the principle that a true balance between the individual and society depends on the recognition of 'the right to be let alone – the most comprehensive of rights and the right most valued by civilized men.'" *Sitz, supra*, 496 U.S. at 459 (BRENNAN, J., dissenting). A traffic stop must be based on specific, objective facts that justify the seizure of a particular individual, or the seizure must be carried out pursuant to

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[1] American Heritage Dictionary of the English Language, Fourth Edition.

a plan embodying explicit, neutral limitations on the conduct of individual officers. *Prouse, supra*, 440 U.S. at 663.

The Kentucky State Police guideline for checkpoints ignores the circumstance of a motorist turning away from a roadblock. The National Highway Traffic Safety Administration guideline on which it is modeled deals specifically with the scenario. "A motorist who wishes to avoid the checkpoint by legally turning before enterning *(sic.)* the checkpoint area should be allowed to do so unless a traffic violation(s) is observed or probable cause exists to take other action. The act of avoiding a sobriety checkpoint does not consititute *(sic.)* grounds for a stop." *The Use of Sobriety Checkpoints for Impaired Driving Enforcement*, p. A-3 (DOT HS 807 656, Nov. 1990) (found at http://ntl.bts.gov/lib/5000/5900/5919/checkpt.pdf). It appears a conscious decision was made in Kentucky to leave discretion with the officer on site.

Bauder was not only behaving lawfully and reasonably in avoiding what he thought to be the scene of a wreck, but he also was complying with Kentucky law. Trooper Gibson was familiar with that law, and acknowledged that he had issued citations for its violation. "No operator of any vehicle, unless he is on official business, shall follow any emergency vehicle (equipped with and operating, one [1] or more flashing, rotating, or oscillating red or blue lights) . . . nor shall he drive into . . . the block where the (emergency) vehicle has stopped. . . ." KRS 189.930(3). Petitioner complied with the mandate of one statute, only

to have that obedience used against him as the very act which justifies his being stopped for generalized suspicion of unspecified criminal activity under a different statute. He faced a Hobson's choice to approach the apparent wreck and emergency vehicles, thereby violating a statute, or turn away, and be stopped for unspecified criminal activity. His arrest and conviction should not stand.

CONCLUSION

The Court should grant the writ of certiorari and reverse the decision of the Kentucky Supreme Court.

Respectfully submitted,

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299 S.W.3d 588 (Ky. 2009)

RENDERED: OCTOBER 29, 2009

Supreme Court of Kentucky

2008-SC-000056-DG

MARK E. BAUDER APPELLANT

V. ON REVIEW FROM COURT OF APPEALS
CASE NO. 2007-CA-001915-DR
BOYLE CIRCUIT COURT NO. 07-XX-00002

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION OF THE COURT
BY JUSTICE CUNNINGHAM

AFFIRMING

Appellant, Mark E. Bauder, was arrested on December 26, 2005, at approximately 11:00 p.m., by Kentucky State Trooper, Eric Gibson, and charged with driving under the influence of alcohol. As part of an effort by the Kentucky State Police to deter driving while under the influence during the holiday season, a roadblock was established at the intersection of Kentucky Highway 300 and Kentucky Highway 34 in Parksville, Kentucky. The troopers activated their emergency lights and established a location on the sides of the intersection, but placed no markings or signs to notify the public in advance of the roadblock.

According to the testimony of Trooper Gibson, Appellant came to an abrupt stop within one hundred feet of the checkpoint and made a turn onto Mill

Road, a side road leading to a fire station, cemetery, and several residences.[1] It is undisputed that Appellant had a clear, unobstructed view of the roadblock. At this point, no other vehicles had proceeded through the roadblock and Appellant's vehicle was the first one observed by the officer. Appellant used the side road to circumvent the 34/300 intersection, and he eventually turned off that road and re-entered Kentucky Highway 300 and continued on his way, effectively bypassing the roadblock.

Upon witnessing this, Trooper Gibson followed Appellant and proceeded to stop him. When Trooper Gibson approached Appellant, he noticed that Appellant smelled of alcohol and appeared to be under the influence. Trooper Gibson stated that he observed no other offenses committed by Appellant, and that he stopped Appellant based solely on his avoidance of the roadblock. Appellant admitted to attempting to bypass the roadblock, but stated that he did so out of a belief that there had been a wreck.

Prior to this day, Trooper Gibson had participated in over one hundred other such roadblocks. In his experience, Trooper Gibson noted that a vehicle turning away from a roadblock was generally indicative of the operator of that vehicle either driving while intoxicated or driving on a suspended license. While

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[1] There is some discrepancy concerning the distance. Appellant contends that the intersection of Mill Road and Kentucky 34 was approximately 80-100 *yards* from the roadblock.

some drivers might turn to avoid an accident, this typically only happened when traffic was congested. As such, Trooper Gibson testified that when manpower allowed, he would routinely stop those drivers avoiding a police roadblock.

Appellant subsequently filed a motion to suppress the evidence obtained during the "unlawful, warrantless arrest, in the absence of probable cause." The Boyle District Court denied Appellant's motion to suppress and on March 17, 2007, Appellant entered a conditional guilty plea to DUI, first offense. Pursuant to a written notation on the guilty plea form, Appellant reserved the right to seek appellate review of the Boyle District Court's ruling on his motion to suppress. By order dated August 27, 2007, the Boyle Circuit Court affirmed the trial court's ruling and on December 17, 2007, the Court of Appeals denied discretionary review. Discretionary review was then granted by this Court.

Appellant's primary contention on appeal is that the trial court erred in failing to suppress the evidence seized because the arresting officer had no articulable and reasonable suspicion that Appellant had violated the law prior to the stop. The undisputed facts establish that Appellant was subjected to an investigatory stop, and it is ultimately to be determined whether that stop was consistent with Appellant's right to be free from an unreasonable seizure as protected by the Fourth Amendment to the Constitution of the United States and Section 10 of the Kentucky Constitution.

A police officer may constitutionally conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot. *Terry v. Ohio,* 392 U.S. 1, 30 (1968). A reasonable suspicion is more than an "unparticularized suspicion or 'hunch.'" *Id.* at 27. Reasonable suspicion, while requiring less of a showing than probable cause, requires at least a minimal level of objective justification for making the stop. *United States v. Sokolow,* 490 U.S. 1, 7 (1989). Accordingly, the stop of an automobile and the resulting detention of the driver are unreasonable, under the Fourth Amendment, absent a reasonable, articulable suspicion that the driver is unlicensed, or that the automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of the law. *Delaware v. Prouse,* 440 U.S. 648, 663 (1979). The court must consider the totality of the circumstances in determining whether a police officer had a particularized and objective basis for suspecting that a person stopped may be involved in criminal activity. *United States v. Cortez,* 449 U.S. 411, 417-18 (1981).

The United States Supreme Court prescribed the proper standard of review in *Ornelas v. United States,* 517 U.S. 690 (1996). *Ornelas* provides that the determination of a lower court regarding a suppression motion based on an alleged illegal search is subject to a two-pronged analysis. First, historical facts should be reviewed for clear error, and the facts are deemed to be conclusive if supported by substantial evidence. *Id.* at 699. Second, determinations of reasonable

suspicion and probable cause are mixed questions of law and fact and are, therefore, subject to *de novo* review. *Id.* In addition, we are bound to give "due weight to inferences drawn from those facts by resident judges and local law enforcement officers." *Id.*

Appellant contends that the totality of the circumstances in this case, as established by the undisputed evidence, did not give rise to the requisite reasonable suspicion that he may have been involved in some form of criminal or otherwise unlawful activity. He argues that none of his driving maneuvers in proximity to the checkpoint were unlawful, and that the avoidance of the checkpoint itself is not unlawful. Trooper Gibson made it clear that the sole reason he stopped Appellant was because he turned his vehicle off the highway prior to the roadblock. Thus, Appellant contends that under such circumstances, neither Trooper Gibson nor any objectively reasonable police officer would believe that the pursuit and stop were appropriate.

The Court of Appeals addressed this issue with strikingly similar facts in *Steinbeck v. Commonwealth,* 862 S.W.2d 912 (Ky.App. 1993). In *Steinbeck,* police had set up a roadblock to detect intoxicated drivers and it was established approximately one hundred yards from the Kentucky end of the Cairo Bridge. At around 3:15 a.m., Steinbeck was driving his pickup truck from Cairo, Illinois to his home in Ballard County, Kentucky. After exiting the bridge, but before reaching the roadblock, Steinbeck made a

left-hand turn onto an "unpaved country road with no visible structures or housing along its route." *Id.* After seeing Steinbeck turn, an officer got into his cruiser and conducted an investigatory stop. As in this case, the sole basis for the stop was the deputy sheriff's "belief that [Steinbeck] was attempting to avoid the checkpoint due to intoxication." *Id.* at 913. This belief was based in part on the sheriff's own experience that in "every road check" that he had been a part of "every [driver] that turns [on that road] . . . has been drinking alcohol. . . ." *Id.* Relying heavily on *Snyder v. State,* 538 N.E.2d 961 (Ind.Ct.App. 1989), the Court of Appeals held that the officer had specific, reasonable, and articulable facts which allowed him to draw an inference sufficient to form a belief that Steinbeck might have been engaging in criminal activity, thus justifying the stop. *Steinbeck,* 862 S.W.2d at 914. This finding was based on a "totality of the circumstances" analysis:

> We believe that appellant's turn away from the sobriety checkpoint, *coupled with* the deputy sheriff's experience in similar instances, the time of day, and the nature of the roadway onto which the appellant turned, constitute specific, reasonable, and articulable facts which allowed the police officer to draw an inference sufficient to form a reasonable suspicion that the driver might have been engaging in criminal activity. (Emphasis added.)

Steinbeck, 862 S.W.2d at 914.

Contrary to the opinion expressed in the dissent, we will wait for another day to determine if the act of making a turn around *itself* raises a specific and articulable fact sufficient to give rise to reasonable suspicion. Here, we apply the "totality of the circumstances" approach in *Steinbeck* to determine if reasonable suspicion exists. Officers may draw on their own experience and specialized training to make inferences from, and deductions about, the cumulative information available to them that might well elude an untrained person. *United States v. Arvizu,* 534 U.S. 266, 273-74 (2002). Police officers are in an extraordinary position that requires them to make split-second determinations of reasonable suspicion, sometimes in dire and even dangerous circumstances. This determination is generally made through the prism of each officer's own training and experience. *See Ornelas,* 517 U.S. at 699 ("[A] police officer views the facts through the lens of his police experience and expertise. The background facts provide a context for the historical facts, and when seen together yield inferences that deserve deference."). This Court has made clear that due deference must be given to the reasonableness of inferences made by police officers. *Commonwealth v. Whitmore,* 92 S.W.3d 76, 79 (Ky. 2002).

Certainly, there are a multitude of reasons why a driver may avoid a police roadblock, many of which may be completely innocent. *Bass v. Commonwealth,* 525 S.E.2d 921, 925 (Va. 2000) ("The reasons for which a driver may reverse direction other than to

evade a traffic checkpoint are legion in number and are a matter of common knowledge and experience."). However, we must apply an objective test from the viewpoint of the officer. We believe that under the circumstances of this case, reasonable suspicion arose and justified Appellant's stop by Trooper Gibson.

According to the testimony of Trooper Gibson, Appellant came to an "abrupt" stop one hundred feet from the roadblock before turning onto a side road. *See United States v. Lester,* 148 F.Supp.2d 597, 603 (D.Md. 2001) ("[T]he closer a motorist is to a roadblock when he or she turns, the more objectively reasonable it may be to infer the turn was made out of a consciousness of guilt."). It is undisputed that Appellant's view of the roadblock was unobstructed when he made the turn. Moreover, at the time of making the turn, there was no congestion along the highway and no line had yet formed at the roadblock. Indeed, Trooper Gibson testified that Appellant's car was the first he saw after establishing the roadblock. It is understandable that a person may wish to avoid the delay which an encounter with police might entail. However, in this case, virtually no delay would have resulted since Appellant was the first driver to approach the roadblock. Furthermore, Trooper Gibson observed Appellant exit the highway, proceed down Mill Road past residential opportunities or other logical destinations, and then re-enter the highway, effectively avoiding the intersection and the police roadblock. It was obvious to the officer that this was not simply a motorist intent on innocuously pulling

into his own driveway. Though Trooper Gibson may not have observed any other traffic violations on the part of Appellant, his own training and experience, coupled with the above-mentioned circumstances, reasonably indicated that Appellant was intentionally avoiding the roadblock to evade arrest or detection. As such, Trooper Gibson clearly had a reasonable suspicion, based on specific and articulable facts, that Appellant was committing a crime or otherwise engaging in unlawful activity, thus justifying the investigatory stop.

The dissent centers its argument on the right to be left alone. Surely, with over 40,000 Americans losing their lives on our highways each year, a person does not enter upon our highly regulated, highly policed, overcrowded and dangerous public highways with any attending expectation of "simply being left alone." If such notion is to take on Constitutional proportion, then motorists would be entitled to simply blow through roadblocks with a wave and contemptuous grin. There would be no law on our highways.

For the reasons set forth herein, the judgment of the Boyle Circuit Court is hereby affirmed.

Abramson, Schroder and Scott, JJ., concur. Venters, J., dissents by separate opinion, in which Minton, C.J., and Noble, J., join.

VENTERS, JUSTICE, DISSENTING: I am unable to agree with the majority's conclusion that the circumstances present in this case meet the Constitutional standard of "at least articulable and reasonable suspicion" required by *Delaware v. Prouse,* 440 U.S. 648, 663 (1979), and, therefore, I respectfully dissent. I understand the majority's reliance upon *Steinbeck v. Commonwealth,* 862 S.W.2d 912 (Ky.App. 1993) because the facts are similar. But, I would regard that similarity as cause to re-examine *Steinbeck,* not to stretch even thinner the concept of articulable, reasonable suspicion.

Even so, the facts in *Steinbeck* deemed to constitute reasonable suspicion were markedly stronger than those we find here. In *Steinbeck:* 1) the vehicle turned onto a side road within sight of, but before reaching the checkpoint; 2) the side road was an "uninhabited and unpaved" country road, so no legitimate reason for the turn was apparent; 3) in the arresting officer's experience, the drivers of all vehicles that have turned away from a checkpoint have been drinking alcohol; and 4) the event occurred at 3:15 a.m.

In this matter, Bauder was arrested at a time when many people are still out, around 11:00 p.m. Mill Road, onto which Bauder turned before the checkpoint, is a marked, paved, public road, with several residences in plain sight. Mill Road forms a shortcut for people traveling between Kentucky

Highway 34 and Kentucky Highway 300.[2] It was also a shortcut to Bauder's house. Additionally, Bauder correctly notes that KRS 189.930(3) prohibits driving into a block where emergency vehicles with lights flashing have stopped for an emergency. Thus, unlike the facts in *Steinbeck,* there were legitimate explanations for Bauder's turn onto Mill Road that the arresting officer should have considered before determining "articulable and reasonable suspicion" existed to instigate a stop. Bauder could have been taking a shortcut or avoiding what appeared to be an emergency on the road ahead. Significant is the fact that the arresting officer acknowledged that he attempts to stop every vehicle that turns before reaching a checkpoint[3], despite his own experience that some drivers who turn to avoid the checkpoint are not guilty of any offense. He did not, therefore, use any discretion or articulate any reason to differentiate

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[2] The majority opinion implies that Bauder "re-entered" Kentucky Highway 300 after traveling on Mill Road. The record however reflects that Bauder was traveling on Kentucky Highway 34, turned onto Mill Road, then turned onto Kentucky Highway 300, which begins at the intersection where the police roadblock was located.

[3] The trooper testified that when the officers are busy with vehicles at the checkpoint, it may be impossible to pursue those that turn away. It is interesting that Appellant was the first vehicle to approach the checkpoint, and when the officer left the site to catch him, the roadblock dissolved due to lack of manpower. Thus, not a single vehicle ever went the through the checkpoint that night.

Bauder's activity from the innocent drivers he has previously stopped.

The facts in this case do not support the level of suspicion created by the facts in *Steinbeck*. The majority's holding expands *Steinbeck* so that the police may now apprehend and detain any person who acts in a manner that suggests an aversion to police contact.

We recently held that one's mere presence on the street in a high crime area late at night does not create an articulable, reasonable suspicion to support police intervention. *Strange v. Commonwealth,* 269 S.W.3d 847, 852 (Ky. 2008). We also held, citing *Florida v. Royer,* 460 U.S. 491 (1983), that a police officer is free to approach any person in a public place for any reason, and ask questions. *Strange,* 269 S.W.3d at 850. However, the corollary of that rule is that the "person may decline to listen to the questions at all and *may go on his way for doing so; and his refusal to listen or answer does not, without more, furnish those grounds* [to seize his person]." *Royer,* 460 U.S. at 498 (Emphasis added). *See also Quintana v. Commonwealth,* 276 S.W.3d 753, 759-760 (Ky. 2008) (holding that one's refusal to open his door and talk to police when they knock does not justify any further intrusion by the police). The majority's opinion in this matter contradicts that rule, saying in effect that any behavior that indicates a desire to avoid interaction with the police is alone suspicious enough to justify a seizure of the person and at least

a temporary detention of that person for further investigation.

The freedom to be left alone is a cherished aspect of our liberty. I fear that the majority opinion will lead to the infringement of that freedom because it sanctions the government's interference with those who simply choose to be left alone, thereby equating the desire to be free from government intrusion with criminal behavior. Despite his own experience, the arresting officer here considered nothing other than Bauder's lawful turn onto a side street as a reason to pursue him. The officer did not exercise any discretion whatsoever. He did not evaluate any of the innocent explanations for Bauder's turn. He did not even act on a non-specific hunch that illegal activity was afoot. He simply acted on his own rule-apprehend the driver of every car that turns away before reaching the checkpoint. The only "circumstance" articulated by the majority to constitute reasonable suspicion is that the officer could think of no reason for Bauder's turn other than an apparent preference to avoid police contact, from which the officer inferred illegal activity. Nothing is offered to justify the stop except Bauder's use of the shortcut that bypassed the roadblock.

It is absurd hyperbole of the majority to suggest that, "There would be no law on our highways" if, as I urge here, we simply adhere to our time-honored Constitutional concept of probable cause and reasonable, articulable suspicion. By this decision, we are now declaring that a citizen's desire to be left alone, to

avoid conversation with the police, is by itself a justification for detention and interrogation. For that reason, I dissent.

Minton, C.J., and Noble, J., join.

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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001915-DR

MARK E. BAUDER MOVANT

v. ON MOTION FOR DISCRETIONARY REVIEW
APPEAL FROM BOYLE CIRCUIT COURT
ACTION NO. 07-XX-00002

COMMONWEALTH OF KENTUCKY RESPONDENT

* * *

ORDER

(Filed Dec. 26, 2007)

BEFORE: KELLER, NICKELL AND STUMBO, JUDGES.

Having considered the motion for discretionary review filed herein by the movant and being otherwise sufficiently advised, this Court ORDERS that this motion be, and it is hereby, DENIED.

ENTERED: 12/17/07 /s/ Michelle M. Keller
JUDGE,
COURT OF APPEALS

COMMONWEALTH OF KENTUCKY
50TH JUDICIAL CIRCUIT
BOYLE CIRCUIT COURT

MARK BAUDER **APPELLANT**

vs. **ORDER** **case no. 07-XX-002**

COMMONWEALTH OF KENTUCKY **APPELLEE**

This matter has come before the Court on appeal from Boyle District Court. Having viewed the petition, response, as well as all other relevant precedent, the Court hereby AFFIRMS the ruling of the Boyle District Court.

Appellant in the instant action was arrested on December 26, 2005 and charged with driving under the influence of alcohol. The arresting officer, Eric Gibson, had established a road block at the intersection of Kentucky Highway 200 and Kentucky Highway 34 in Parksville, Kentucky. At a suppression hearing on the validity of the stop, held June 21, 2006, Trooper Gibson testified that he affected the stop because the appellant attempted to avoid his road block.

Appellant argues that the arresting officer did not have probable cause to make the stop. He contends that he turned off prior to the road block in order to avoid what he perceived to be a traffic accident. He also maintains that the

trooper failed to follow KSP guidelines for checkpoints (OM-E-4).

As the Commonwealth correctly points out, the arresting officer in the instant case did have probable cause to make the stop. In their reply, the Commonwealth relies on *Steinbeck v. Commonwealth*, Ky. App., 862 SW2d 912 (1993), which involved very similar circumstances. In *Steinbeck,* the Court of Appeals, in determining that a driver's turn in advance of a sobriety checkpoint constituted probable cause for the officers to conduct a stop, wrote:

> **The Indiana Court of Appeals recently confronted a case with strikingly similar facts. *Snyder v. State,* 538 N.E.2d 961 (Ind.App. 4 Dist.1989). In *Snyder,* the defendant turned around in the road approximately 100 yards from a roadblock at 1:00 a.m. on a *914 December morning. Like the instant case, it was agreed that he had committed no traffic violations. Upon being stopped, the defendant admitted drinking and failed field sobriety tests. In resolving the issue against the defendant, the Indiana Court opined as follows:**
>
> **If the police are permitted to stop drivers without any individualized suspicion while "operating pursuant to a plan with explicit, neutral guidelines," it does not follow that police are only permitted to stop the "timid" – who**

obediently proceed through the roadblock but are not permitted to stop the "bold" – those who defy the police roadblock by evading it.

The better rule is that while a driver approaching a roadblock is not "seized" until actually reaching the roadblock, a driver's attempt to avoid the roadblock, by making a turn around, does raise a "specific and articulable fact" which gives rise to a reasonable suspicion on the part of a police officer that the driver may be committing a crime. Such a suspicion entitles the officer to detain the driver of the vehicle something short of a full arrest to further investigate whether or not probable cause exists for a search or arrest of the driver. *Terry v. Ohio,* (citation omitted).

Such a rule has either tacitly or overtly been approved in six other states. (Footnote omitted).

If police officers stationed at roadblocks were not permitted to stop such drivers, the very drivers the police seek to deter could flagrantly avoid the roadblocks and the stops would lose their deterrent value. Trooper Maxwell testified that he had pursued and stopped drivers on numerous occasions who sought to avoid roadblocks and inevitably those drivers had suspended or expired licenses, or some other violation of the law. R. at 63,

> **64. His experience gave him specific and articulable facts and inferences drawn therefrom to form a reasonable suspicion that Snyder was committing a crime.**

Based on the aforementioned *Steinbeck* case, this Court finds that the arresting officer did have probable cause to make the stop.

Regarding the trooper's failure to follow proper properly follow KSP guidelines, the only guideline that was not followed was No. 8, which reads: "Media announcements shall be made periodically to inform the public that traffic safety checkpoints would be established in the area." It might be noted that within the aforementioned guideline is the following provision: "The specific locations and times need not be announced". According to testimony at the suppression hearing, all other KSP OM-E-4 guidelines were met. In the case of *Commonwealth v. Bothman,* Ky. App., 941 SW2d 479 (1996), the Court of Appeals, in adjudicating a vehicle checkpoint case, wrote:

> **[E]ven if the checkpoint was established in contradiction to the express language of OM-E-4, which we do not believe to be the case, the dispositive question is whether the establishment of the checkpoint and the subsequent discovery and seizure of the evidence passes constitutional muster. Technical noncompliance**

> **with OM-E-4, which does not have the force of law, does not inexorably lead to the conclusion that the establishment of the checkpoint was violative of the constitutions of the United States or of the Commonwealth.**
>
> **... Moreover, other jurisdictions have similarly held that a police checkpoint will pass constitutional muster without strict compliance with the law enforcement agency's internal guidelines as long as supervisory control is exercised over the establishment and operation of the checkpoint, and as long as the officers do not exercise unfettered discretion in stopping members of the general public. See *State v. Madalena*, 121 N.M. 63, 908 P.2d 756 (App.1995).**

Appellant's decision to bypass the checkpoint gave the officer a reasonable belief that he was attempting to avoid same. That reasonable belief gave the officer probable cause to affect the stop which led to the arrest. The Boyle District Court's decision to deny suppression of the stop was properly made.

For the above stated reasons, IT IS HEREBY ORDERED AND ADJUDGED that the ruling of the Boyle District Court is AFFIRMED. This order is FINAL and APPEALABLE and this Court finds there is no just cause for delay.

Done this, the 23d day of August, 2007.

[/s/ R. Campbell
/s/ R. Clay
Boyle District Court.
8/27/07 bb
DOT. 8/27/07bb]

/s/ Darren W. Peckler
DARREN W. PECKLER,
JUDGE
BOYLE CIRCUIT COURT

COMMONWEALTH OF KENTUCKY
50TH JUDICIAL DISTRICT
BOYLE DISTRICT COURT
CASE NO. 06-T-00005

COMMONWEALTH OF KENTUCKY PLAINTIFF

V.S. **ORDER**

MARK BAUDER DEFENDANT

This Court having heard oral testimony on June 21, 2006, having reviewed the **Defendant's Motion to Suppress, Memorandum of Defendant,** and **Commonwealth's Response to Memorandum of Defendant** and having reviewed Commonwealth's Exhibits and the Defendant's Exhibits that were entered, including photographs and video, and being otherwise sufficiently advised, it is hereby Ordered and Adjudged:

The Court hereby **respectfully** denies the Motion to Suppress for the reasons set forth in **Commonwealth's Response to Memorandum of Defendant** and incorporated herein by reference.

Furthermore, this matter shall remain on the Court's docket scheduled for November 15, 2006 at 1:30 p.m. in the Boyle District Courtroom.

Done this 2 day of November, 2006.

/s/ Jeff Dotson
Jeff Dotson, District Judge
Boyle District Court

CERTIFICATE OF SERVICE

This is to certify that on this 3 day of November, 2006, the foregoing Order was served by ~~first class mail~~ [hand delivery] to Hon. Richard Campbell and Hon. Richard Clay.

By: /s/ Lisa Reed, Judge's Secretary

Supreme Court of Kentucky

2008-SC-000056-DG

MARK E. BAUDER APPELLANT

v. ON REVIEW FROM COURT OF APPEALS
CASE NO. 2007-CA-001915-DR
BOYLE CIRCUIT COURT NO. 07-XX-00002

COMMONWEALTH OF KENTUCKY APPELLEE

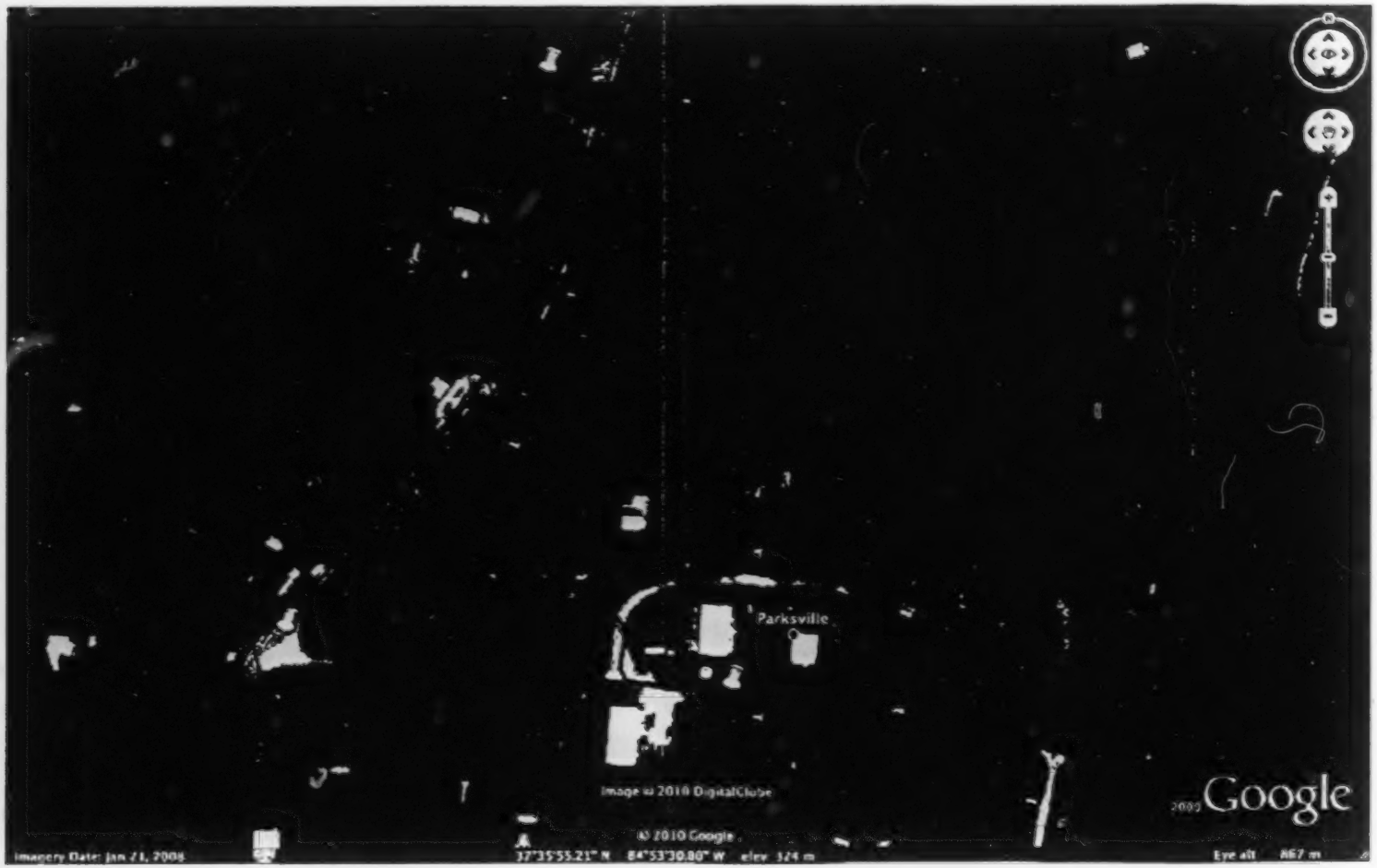
ORDER DENYING
PETITION FOR REHEARING

The Petition for Rehearing, filed by the Appellant, of the Opinion of the Court by Justice Cunningham, rendered October 29, 2009, is DENIED.

All sitting. Minton, C.J.; Abramson, Cunningham, Schroder, Scott, and Venters, JJ., concur. Noble, J., would grant the petition for rehearing.

ENTERED: January 21, 2010.

/s/ [Illegible]
CHIEF JUSTICE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